Awesome Broadcasting Sdn Bhd v MYTV Broadcasting Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCvC)-123–01 OF 2024
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
8 APRIL 2024

Civil Procedure — Injunction — Application for — Appellant applied for injunction to restrain respondent from implementing suspension of digital terrestrial television services — High Court dismissed appellant's application — Whether appellant failed to exhaust statutory remedy provided under Communications and Multimedia Act 1998 — Whether Malaysian Communications and Multimedia Commission was relevant and necessary party to suit

This was an appeal by the appellant ('plaintiff') against the decision of the learned judicial commissioner ('JC') in dismissing the plaintiff's application in encl 7 for injunctive reliefs against the respondent ('defendant'). The plaintiff was a content application service provider ('CASP'). The pith and substance of the plaintiff's complaint was that the defendant, being in a monopolistic/dominant position, had discriminated against the plaintiff in terms of the rates chargeable for the digital terrestrial television services ('DTTS') as the defendant had charged the other CASPs less for the DTTS by giving a 50% discount. The discount was made possible by way of subsidies that were given by the Malaysian Communications and Multimedia Commission ('MCMC'). Pursuant to an access agreement and a supplementary agreement ('the agreements'), the defendant agreed to provide DTTS to the plaintiff at RM500,000 per month. The plaintiff, however, defaulted on its payment obligations. As of 6 October 2023, the amount outstanding was RM5,038,191.38. The defendant proposed for the plaintiff to transition the services to the standard definition at RM2.5m per annum but conditional upon the plaintiff adhering to the payment plan stipulated in the proposal. The plaintiff declined to take up the offer. The plaintiff continued to be in default of their payment obligations under the agreements. As a result of the plaintiff's non-payment of RM5,107,232.86, the defendant gave notice that they would be suspending the DTTS which were provided to the plaintiff under the agreements. The defendant duly notified MCMC of its intention to suspend the DTTS to the plaintiff. MCMC gave their go-ahead for the suspension and the defendant then issued a notice of suspension wherein the plaintiff was notified that the DTTS would be suspended. Subsequently, the plaintiff filed encl 7 and the JC dismissed the application on the grounds that: (a) the plaintiff failed to exhaust the statutory remedy provided under the

Communications and Multimedia Act 1998 ('the Act'); and (b) MCMC was a relevant and necessary party to the suit and the failure of the plaintiff to name MCMC as a party to the action meant that there could be no serious question to be tried as the relevant and necessary party was not before the court. Hence, this appeal.

Held, dismissing the appeal:

(1) The question of whether the defendant was in breach and whether the DTTS should be reinstated and for compensation for losses due to alleged unfair pricing, etc, were all matters which impinged or impacted upon the regulatory jurisdiction and function of MCMC. Whatever that had been agreed upon per the agreements, including pricing etc, were deemed to have been implicitly approved by MCMC. Thus, MCMC's involvement in the factual matrix was quite inescapable. The injunction would effectively be a suspension or dilution of MCMC's function as regulator under the Act. MCMC was an affected party and they should be given an opportunity of being heard in respect of the suit and in particular, encl 7. Such an injunction could not or should not be granted without the presence of MCMC, a statutory regulator, whose decision was directly under curial scrutiny in the suit. They should therefore be heard. The MCMC was a relevant and necessary party to the action that was filed and the plaintiff's case against the defendant was inextricably linked to its case against MCMC as the regulator (see paras 44, 53–54 & 63).

(2) The plaintiff ought to have pursued the domestic statutory remedy of appealing to the appeal tribunal (which they only did on 6 March 2024) and awaited the outcome of the appeal before filing legal action (which was limited only to judicial review). There seemed to be no scope for the plaintiff to file a civil action without pursuing the statutory remedy under the Act. Whilst there were some important issues arising out of the plaintiff's complaints against the defendant and indeed indirectly against MCMC as well, it was clear that the plaintiff should have pursued interlocutory reliefs by way of an originating summons whilst at the same time pursuing the appeal process under the Act (see paras 60–62).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('plaintif') terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') yang menolak permohonan plaintif dalam lampiran 7 untuk relif injunksi terhadap responden ('defendan'). Plaintif adalah penyedia perkhidmatan aplikasi kandungan ('CASP'). Dasar dan inti aduan plaintif adalah defendan, yang berada dalam kedudukan monopoli/dominan, telah mendiskriminasi plaintif dari segi kadar yang boleh dikenakan untuk perkhidmatan televisyen terestrial digital ('DTTS') kerana defendan telah mengenakan caj yang kurang kepada CASP lain untuk DTTS

dengan memberikan diskaun 50%. Diskaun itu dibuat melalui subsidi yang diberikan oleh Suruhanjaya Komunikasi dan Multimedia Malaysia ('SKMM'). Menurut perjanjian akses dan perjanjian tambahan ('perjanjian'), defendan bersetuju untuk memberikan DTTS kepada plaintif pada harga RM500,000 sebulan. Plaintif, walau bagaimanapun, gagal terhadap kewajipan pembayarannya. Sehingga 6 Oktober 2023, jumlah tertunggak ialah RM5,038,191.38. Defendan mencadangkan agar plaintif menukar perkhidmatan kepada definisi standard pada RM2.5 juta setahun tetapi bersyarat kepada plaintif mematuhi pelan pembayaran yang ditetapkan dalam cadangan itu. Plaintif enggan menerima tawaran itu. Plaintif terus gagal terhadap kewajipan pembayaran mereka di bawah perjanjian. Akibat plaintif tidak membayar sebanyak RM5,107,232.86, defendan memberi notis bahawa mereka akan menggantung DTTS yang telah diberikan kepada plaintif di bawah perjanjian. Defendan telah memberitahu SKMM dengan sewajarnya tentang hasratnya untuk menggantung DTTS kepada plaintif. SKMM memberi kebenaran untuk penggantungan itu dan defendan kemudian mengeluarkan notis penggantungan di mana plaintif dimaklumkan bahawa DTTS akan digantung. Selepas itu, plaintif memfailkan lampiran 7 dan PK menolak permohonan itu atas alasan bahawa: (a) plaintif gagal untuk menggunakan remedi statutori yang diperuntukkan di bawah Akta Komunikasi dan Multimedia 1998 ('Akta'); dan (b) SKMM adalah pihak yang relevan dan perlu dalam saman itu dan kegagalan plaintif untuk menamakan SKMM sebagai pihak dalam tindakan itu bermakna bahawa tidak ada persoalan serius untuk dibicarakan kerana pihak yang relevan dan perlu tidak di hadapan mahkamah. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) Persoalan sama ada defendan telah melanggar dan sama ada DTTS perlu dikembalikan dan untuk pampasan bagi kerugian akibat dakwaan penetapan harga yang tidak adil, dan lain-lain, adalah semua perkara yang menjejaskan atau memberi kesan kepada bidang kuasa pengawalan dan fungsi SKMM. Apa sahaja yang telah dipersetujui mengikut perjanjian, termasuk harga dan lain-lain, dianggap telah diluluskan secara tersirat oleh SKMM. Oleh itu, penglibatan SKMM dalam matriks fakta adalah tidak dapat dielakkan. Injunksi itu secara berkesan akan menjadi penggantungan atau pencairan fungsi SKMM sebagai pengawal selia di bawah Akta tersebut. SKMM adalah pihak yang terjejas dan mereka harus diberi peluang untuk didengar berkenaan dengan saman itu dan khususnya, lampiran 7. Injunksi sedemikian tidak boleh atau tidak patut diberikan tanpa kehadiran SKMM, pengawal selia berkanun, yang keputusannya telah dibuat secara langsung di bawah penelitian curial dalam saman itu. Oleh itu, mereka harus didengari. SKMM adalah pihak yang relevan dan perlu kepada tindakan yang difailkan dan kes plaintif terhadap defendan mempunyai kaitan erat dengan kesnya

terhadap SKMM sebagai pengawal selia (lihat perenggan 44, 53–54 & 63).

(2) Plaintif sepatutnya meneruskan remedi statutori domestik dengan merayu kepada tribunal rayuan (yang hanya mereka lakukan pada 6 Mac 2024) dan menunggu keputusan rayuan sebelum memfailkan tindakan undang-undang (yang hanya terhad kepada semakan kehakiman). Sepertinya tiada ruang untuk plaintif memfailkan tindakan sivil tanpa meneruskan remedi statutori di bawah Akta. Walaupun terdapat beberapa isu penting yang timbul daripada aduan plaintif terhadap defendan dan sememangnya secara tidak langsung terhadap SKMM juga, adalah jelas bahawa plaintif sepatutnya meneruskan relief interlokutori melalui saman pemula sementara pada masa yang sama meneruskan proses rayuan di bawah Akta tersebut (lihat perenggan 60–62).]

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417; [1995] 4 CLJ 551; [1995] 3 AMR 305, CA (refd)

Awesome Broadcasting Sdn Bhd v MYTV Broadcasting Sdn Bhd [2024] 9 MLJ 656; [2024] CLJU 265, HC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (refd)

Hong Kong Vegetable Oil Company Ltd A v Malin Sirinaga Wicker & Ors [1978] 2 MLJ 13 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

London Passenger Transport Board v Moscrop [1942] AC 332, HL (refd)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41; [1970] CLJU 80; [1970] 1 LNS 80, FC (refd)

Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal [2014] 4 MLJ 377; [2014] 3 CLJ 733, CA (refd)

Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2010] 9 CLJ 505, FC (refd)

Legislation referred to

Communications and Multimedia Act 1998 ss 18, 91, 120, 120(1), 121, 133, 139, 149, 149(2)

Sales Tax Act 1972 (repealed by Goods and Services Tax Act 2014) s 68

Appeal from: *Awesome Broadcasting Sdn Bhd v MYTV Broadcasting Sdn Bhd* [2024] 9 MLJ 656 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (with Genevieve Vanniasingam) (Shafee & Co Chambers) for the appellant.
Gopal Sreenevasan (with Kelvin Seet Wan Nam) (Cheang & Ariff) for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] This is an appeal by Awesome Broadcasting Sdn Bhd (plaintiff) against the decision of the learned judicial commissioner ('the JC') of the High Court at Kuala Lumpur dated 11 January 2024 dismissing the plaintiff's application dated 30 October 2023 (per High Court encl 7) for injunctive reliefs against MYTV Broadcasting Sdn Bhd (defendant). The decision of the High Court in dismissing encl 7 is reported as *Awesome Broadcasting Sdn Bhd v MYTV Broadcasting Sdn Bhd* [2024] 9 MLJ 656; [2024] CLJU 265 (HC). We heard oral arguments on 26 March 2024. On 8 April 2024, we dismissed the plaintiff's appeal and gave broad grounds. This judgment contains our full grounds.

NOMENCLATURE

[2] For convenience, we shall refer to the appellant and respondent as 'plaintiff' and 'defendant'. In the contemporaneous letters between the parties, the plaintiff is referred to as 'ATV' and the defendant as 'MYTV'. Next, and although not named as a party, the Malaysian Communication and Multimedia Commission is also tied up to the factual matrix of this case. They shall be referred to in this judgment as 'MCMC'. The Communications and Multimedia Act 1998 (Act 588) shall be referred to as 'the Act'. The Minister of Communication and Multimedia is referred to as 'the Minister'. The services that were provided by the plaintiff to the defendant is known as Digital Terrestrial Television Services and shall be referred to as 'DTTS'. The plaintiff is technically known as a Content Application Service Provider or 'CASP' (plural — 'CASPs').

THE PROBLEM — IN BRIEF

[3] The pith and substance of the plaintiff's complaint is that the defendant, being in a monopolistic/dominant position, had discriminated against the plaintiff in terms of the rates chargeable for the DTTS. In this regard, the plaintiff's complaint is that the defendant had charged the other CASPs less for the DTTS by giving a 50% discount. The discount was made possible by way of subsidies that are given by the MCMC.

[4] Pursuant to an access agreement dated 17 July 2020 ('the access

agreement') and a supplementary agreement dated 14 July 2021 (collectively, 'the agreements') the defendant agreed to provide DTTS to the plaintiff at RM500,000 per month (RM6m per year). In April 2022, the plaintiff defaulted on its payment obligations. Later they remedied the position and paid up the amounts outstanding. Then, the plaintiff again failed to make payments between February 2023 and October 2023.

[5] As at 6 October 2023 the amount outstanding was RM5,038,191.38. On 5 October 2023, MCMC attempted to mediate the dispute between the plaintiff and the defendant. This led to the defendant making a proposal for the plaintiff to transition the services to the standard definition ('SD') at RM2.5m pa but conditional upon the plaintiff adhering to the payment plan stipulated in the said proposal. The plaintiff declined to take up the offer.

[6] The issue which is at the heart of the dispute is the plaintiff's deep dissatisfaction with the fact that other CASPs who are similarly receiving DTTS from the defendant are being charged at 50% less than the amounts being paid by the plaintiff to the defendant. As mentioned earlier, the reduction in the amount chargeable to the other CASPs for DTTS was made possible by subsidies given by MCMC.

[7] The agreements were registered by MCMC (see: s 150 of the Act). It is material to note that pursuant to s 91 of the Act, MCMC shall register the agreements only if it is satisfied that the agreements are consistent with:

(a) the objects of this Act;

(b) any relevant instrument under this Act; and

(c) any relevant provisions of this Act or its subsidiary legislation.

[8] Hence, arising out of the disputes between the plaintiff and defendant over the former's failure to make payments for the DTTS, the plaintiff made representations and implored upon MCMC to intervene to 'address the unlevel playing field of the pricing' which was set by the defendant. According to the plaintiff, the price that was set by the defendant was also 'a function of the unfair exclusion' of the plaintiff from receiving subsidies from MCMC.

[9] The JC described the plaintiff's grievance as one which is predicated upon the allegation of inequitable treatment and a lack of action by MCMC, as regulator. The JC regarded the case as one where the plaintiff claimed to be the 'victim' of 'inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices and breach of contract'. All of these issues were duly escalated by the plaintiff to MCMC. Apparently, these issues were investigated by the MCMC and found to be unsubstantiated.

[10] The plaintiff continued to be in default of their payment obligations under the agreements. As a result of the plaintiff's non-payment of *RM5,107,232.86*, the defendant gave notice that they would be suspending the DTTS which were provided to the plaintiff under the agreements. Pursuant to condition 8.4(a)(ii) of the access agreement, the defendant duly notified MCMC of its intention to suspend the DTTS to the plaintiff.

[11] Pursuant to condition 8.4(b)(ii) of the access agreement, MCMC gave their go-ahead (via letter dated 17 October 2023) for the suspension. The defendant then issued a *notice of suspension dated 19 October 2023* wherein the plaintiff was notified that the DTTS would be suspended on 2 November 2023 at 12.01am. On 20 October 2023, the plaintiff filed the suit in the High Court and also applied for interim injunctive reliefs per encl 7.

[12] The injunctive reliefs sought in encl 7 (in Bahasa Malaysia) are as follows:

1. Injunksi interim terhadap Notis Penggantungan bertarikh 19.10.2023 sementara menunggu pendengaran permohonan ex-parte ini;
2. Bahawa sementara menunggu pendengaran permohonan ex-parte Plaintif di sini, satu injunksi interim untuk menghalang Defendan, sama ada dengan sendirinya, atau oleh pekhidmat atau ejennya atau sebaliknya dengan apa cara 2 sekalipun, Defendan daripada menggantungkan perkhidmatan Televisyen Terestrial Digital ('DTT') Plaintif;
3. Satu injunksi mandatori terhadap Notis Penggantungan bertarikh 19.10.2023;
4. Sementara menunggu pendengaran dan pelupusan permohonan ex-parte Plaintif di sini atau sehingga perintah lanjut Mahkamah Mulia ini, satu injunksi mandatori terhadap Defendan, sama ada dengan sendiri mereka atau oleh pekhidmat atau ejen mereka atau sebaliknya dengan apa cara sekalipun, daripada menggantung perkhidmatan DTT Plaintif;
5. Sementara menunggu pendengaran dan penentuan permohonan ex-parte Plaintif di sini, satu injunksi interim dibuat seperti yang dipohon dalam termaterma di perenggan (1) dan (2);
6. Kos yang timbul dan disebabkan oleh permohonan ini menjadi kos dalam kausa; dan
7. Lain-lain relif dan/atau perintah-perintah yang Mahkamah yang Mulia ini fikirkan wajar, patut dan sesuai.

BACKGROUND FACTS

[13] We may now examine the background facts in great detail. The following paragraphs from the statement of claim may be regarded as a fair

narration of the background facts:

B. THE MATERIAL FACTS

4. At all material times, the Plaintiff holds a license granted by the Minister of Communications and Multimedia Malaysia, authorising the provision of content application services. Under the terms of this licence, the Plaintiff is permitted to provide these services exclusively through Terrestrial Free to Air ('FTA') TV via a digital terrestrial television ('DTT') broadcasting platform.

5. The Defendant was appointed by the Government of Malaysia to develop and operate the infrastructure and network facilities for DTT in Malaysia. At all material times, the Defendant has stood as the sole provider of DTT services in Malaysia. Thus, any television station holding a licence to provide content application services is mandated to procure the DTT service offered by the Defendant.

6. On 17.07.2020, the Plaintiff and the Defendant entered into an Access Agreement for the Provision of Digital Terrestrial Television Services ('Access Agreement'), whereby the Plaintiff requested access to the services of the Defendant in respect of its content application services through the DDT of the Defendant and distribution network within Malaysia for the sum of RM6,000,000.00 per annum.

7. On 14.07.2021, the Plaintiff and the Defendant entered into a Supplemental Access Agreement for the DTT Services ('Supplemental Access Agreement').

8. Following the expiry of the Access Agreement and Supplemental Access Agreement, the Plaintiff obtained access to the services of the Defendant concerning its content application services through the DTT and distribution network within Malaysia on a monthly advance issued invoice basis at a rate of RM500,000.00 per month.

9. On or about August 2023, a meeting was convened between the Managing Director and Chief Operating Officer of the Plaintiff, and the Chief Executive Officer and Chief Operating Officer of the Defendant. During the course of the said meeting, the Managing Director of the Plaintiff sought clarification regarding the information that had come to their attention, specifically that certain other television stations were being levied charges amounting to merely 50% of the charges being borne by the Plaintiff for the same DTT service. The representatives of the Defendant attempted to elucidate that certain networks, by virtue of operating more than one station, were privileged to a volume discount arrangement, and that certain nascent stations were beneficiaries of governmental subsidies facilitated through the Malaysian Communications and Multimedia Commission ('MCMC') and the Defendant, and that these privileges were non applicable to the Plaintiff.

10. The Managing Director of the Plaintiff further questioned why the Plaintiff, being a newly established entity as well, was excluded from such subsidy provisions. The Defendant clarified that the dispensation of such grants necessitated approval from MCMC, and unfortunately, the implementation of these grants came into effect subsequent to the Plaintiff initiation of broadcast operations. Thus, the temporal circumstances delineated by the regulatory protocols of MCMC precluded the Plaintiff from availing the benefits of the governmental subsidies that were extended to other new entrants in the broadcasting domain.

11. On 05.10.2023, a mediation was held by the MCMC on the suspension of the DTT service of the Plaintiff on the platform of the Defendant.

12. On 06.10.2023, the Defendant issued a letter to the Plaintiff stating that following the mediation process conducted by the MCMC on 05.10.2023, the outstanding amount due by the Plaintiff for the provision of DTT service stands at RM5,038,191.78, equating to nine months of service including late payment charges. The letter dated 06.10.2023 proposed a settlement to transition the service to Standard Definition ('SD') at RM2,500,000 per annum, contingent on the Plaintiff adhering to a payment plan for the outstanding amount. The plan requires an initial payment of RM2,000,000 within seven days from the date of the letter, with the remaining balance to be cleared within the next four months, alongside a security sum of RM625,000. The Plaintiff was expected to respond to this proposal by 09.10.2023, with a notice of service suspension by the Plaintiff in case of non-compliance.

13. On 09.10.2023, the Plaintiff wrote a letter to the MCMC and the Defendant expressing their willingness to enter into a SD Access Agreement with the Defendant at RM2,500,000.00 per annum starting November 2023. However, the Plaintiff contested the settlement payment based on the invoiced values of the Defendant, asserting that the SD Access Agreement should not be tied to these invoices. The Plaintiff presented several points for further deliberation by the MCMC to ensure the Defendant is conducting fair business practices:

(a) information from the Defendant revealed that certain networks of TV stations paid 50% lesser based on volume deals. It is contended that similar concessions should be extended to the Plaintiff due to the clear absence of economies of scale between the platform of the Defendant and the Plaintiff, as evidenced by empirical data from Nielsen TV Audience Measurement.

This data highlighted that the platform of the Defendant contributes a mere 20%-30% towards audience measurement of FTA TV stations, particularly the Plaintiff;

(b) further information from the Defendant indicated that some nascent TV stations paid 50% lesser as a result of subsidies from MCMC. The Plaintiff, having commenced transmission on 03.08.2020, qualifies as a nascent entity within the industry as well. Nonetheless, an arbitrary and discriminatory self-imposed adherence to a commencement date for such discounts/subsidies unjustly excluded the Plaintiff from these privileges, placing the Plaintiff in an economically disadvantageous position. It is noteworthy that the Plaintiff has undertaken substantial promotional endeavours for the Defendant since 2020, without any marketing cost subsidies from either the Defendant or MCMC;

(c) observation of the performance of the Defendant in promoting its services accentuates a deficiency in expanding the active footprint of viewers, having garnered merely 20%-30% of the TV viewer market. The failure of the Defendant to entice 80% of the viewers to transition from rival transmission platforms to the platform provided by the Defendant has detrimentally impacted the revenue stream of the Plaintiff. As such, a rectification via discounted pricing on the carriage fees levied upon the Plaintiff by the

A Defendant is warranted, akin to the concessions extended to other TV stations and/or at a rate of 50% of the fees;

(d) the Defendant, as the sole provider of the DTT services within the Malaysian FTA TV industry, enjoys a monopolistic advantage. The high carriage fees imposed upon the Plaintiff, coupled with a disinclination towards offering discounts, epitomizes monopolistic behaviour, subjecting the Plaintiff to unfair business practices. This monopolistic condition extends beyond transmission services, given that the Defendant shares congruent ultimate majority ownership with another expansive network of TV stations in Malaysia, thus engendering a conflict of interest presence;

C (e) the Plaintiff disbursed a substantial sum of RM15 million spanning from 2020 to 2023. Had the charges been moderated to encompass a merited discount of 50%, *this sum would have sufficed to cover services of the Defendant for a duration of 60 months or 5 years,* specifically from August 2020 to July 2025.

D A 50% discount is deemed most apposite, given the prior indication of a scant 20%-30% viewers' contribution by the Defendant to the FTA TV stations;

(f) MCMC should foster a conducive environment for TV stations to persist in broadcasting via monopolistic platforms such as that of the Defendant, by acting as a judicious mediator for TV stations. The unfair business practices elucidated could impel TV stations to forgo the FTA platform and venture into digital platforms, a trend exacerbated by the upward trajectory in digital media demand. This is manifested by the substantial reallocation of 60% to 80% advertisement expenditure budget by advertisers towards digital platforms. This scenario is further exacerbated by the reality that 80%-90% of the said digital advertisement revenue is appropriated by multinational digital platforms operating extraterritorially, thereby evading requisite Government taxations and concurrently depriving local media entities of economic sustenance;

(g) in light of the preceding matters, it is not agreed that the Defendant charges the Plaintiff any late payment charges;

(h) given the aforementioned matters, it is not agreed that the Defendant is allowed to suspend the transmission of the Plaintiff on the DTT platform of the Defendant;

H (i) the Plaintiff expressed hope for mediation by the MCMC to rectify the unequal pricing and the unjust and discriminatory exclusion from subsidy benefits, aiming for equitable treatment in the industry.

14. On 12.10.2023, the MCMC responded to the letter dated 09.10.2023 from the Plaintiff, albeit addressing only certain issues raised therein, and did so in an unsatisfactory manner.

I 15. On 19.10.2023, the Defendant issued a notice of suspension to the Plaintiff in accordance with Clause 8.3 of the Access Agreement dated 17.07.2020, indicating the suspension of DTT services effective from 02.11.2023 at 12.01am, due to the non-payment of the purported indebted sum amounting to RM5,107,232.86 as of the said date ('Notice of Suspension'). Further, the Defendant received permission

from MCMC before issuing the Notice of Suspension to the Plaintiff. This Notice of Suspension was issued while negotiations between the Plaintiff and the Defendant are still ongoing.

16. On 19.10.2023, the Plaintiff responded to the letter dated 12.10.2023 from the MCMC by stating the following:

(a) the Plaintiff claims an overpayment to the Defendant, *totalling a loss of 30 months of service at the rate charged to other entities.* This discrepancy, coupled with a lack of subsidy from MCMC, places the Plaintiff at an economic disadvantage, having paid RM15 million to date at RM500,000 per month;

(b) the Defendant's goal of 7 million viewers is deemed inadequate, representing less than 30% of the 23 million TV viewers in the market as per Nielsen data. The low distribution and activation of the Defendant SetTop Boxes hinder its attractiveness to advertisers and viability as a platform for FTA TV stations;

(c) the monopolistic structure within the Malaysian broadcasting sector, driven by common control over the Defendant and Media Prima Berhad, hinders fair business negotiations with the Defendant. This situation calls for MCMC's critical intervention similar to the role Malaysian Competition Commission plays in other sectors;

(d) the Plaintiff urges the MCMC to take several actions: prevent the Defendant from suspending the broadcasting of the Plaintiff, approve a retrospective subsidy for Access Pricing for the Plaintiff, direct the Defendant to adjust the pricing to align with other entities, require the Defendant to devise a better marketing strategy to enhance viewer reach, and diligently assess the monopolistic positions enjoyed by the Defendant and Media Prima Berhad, akin to the functions performed by MyCC in other sectors.

[14] The plaintiff's claims are found at paras [17]–[36] of the statement of claim and read as follows;

C. THE CLAIMS

(i) Inequality of bargaining power

17. The Plaintiff pleads that there was a significant inequality of bargaining power between the Plaintiff and the Defendant. The Defendant, being the sole provider of DTT services in Malaysia, held a dominant position which adversely affected the Plaintiff ability to negotiate fair terms.

This inequality led to a significant disadvantage in the contractual arrangements and subsequent dealings, severely impacting the Plaintiff business operations and financial stability.

Particulars

Paragraphs 4 to 16 above are reiterated and adopted herein.

19. As a result, the Plaintiff has suffered losses and damages as outlined in Part D below.

(ii) Breach of contract and unfair exercise of contractual discretion

21. The Plaintiff pleads that the Defendant, by virtue of the Access Agreement, Supplemental Access Agreement and the monthly advance-issued invoices, owed a duty to the Plaintiff to exercise contractual discretion reasonably, in good faith, and not arbitrarily or capriciously and in a proportional manner. The essence of this duty is to maintain a fair and equitable trading relationship between the parties.

Particulars

22. Paragraphs 4 to 20 above are reiterated and adopted herein.

23. It has come to light that the Defendant has been levying higher charges on the Plaintiff as compared to other television stations, and the failure to extend volume-based discounts and governmental subsidies, manifest an unfair and arbitrary exercise of contractual discretion contrary to the principles of good faith, reasonableness and proportionality.

24. As a result, the Plaintiff has suffered losses and damages as outlined in Part D below.

(iii) Discriminatory treatment and unjust enrichment

25. The Plaintiff pleads that the Defendant pricing structure, which has subjected the Plaintiff to higher charges, coupled with the exclusion of the Plaintiff from subsidy benefits despite being a newly established entity, constitutes unjust enrichment and discriminatory treatment. This discriminatory pricing structure places the Plaintiff at a significant economic disadvantage.

26. Further, the Defendant monopolistic behaviour and the conflict of interest arising from common control over the Defendant and Media Prima Berhad exacerbate this discriminatory treatment, thereby creating an uneven playing field against the Plaintiff.

Particulars

Paragraphs 4 to 24 above are reiterated and adopted herein.

27. As a result, the Plaintiff has suffered losses and damages as outlined in Part D below.

(iv) Failure to act in good faith

29. The Plaintiff pleads that failure of the Defendant to provide equitable treatment in pricing and subsidy benefits, despite negotiations and mediation by the MCMC, demonstrates a lack of good faith and fair dealing as obligated under the agreements.

30. The issuance of a Notice of Suspension by the Defendant during ongoing negotiations and the imposition of late payment charges, reflect bad faith and an unreasonable exercise of contractual discretion.

Particulars

Paragraphs 4 to 28 above are reiterated and adopted herein.

31. As a result, the Plaintiff has suffered losses and damages as outlined in Part D below.

(v) Unlawful Suspension of Services

33. The Plaintiff pleads that the Defendant action of suspending the DTT services of the Plaintiff, especially during the pendency of negotiations and without

adequate justification for the differential treatment in pricing, is unlawful and in breach of the terms of the agreements. This action has caused significant disruption in the Plaintiff operations and financial losses.

Particulars

Paragraphs 4 to 32 above are reiterated and adopted herein.

34. As a result, the Plaintiff has suffered losses and damages as outlined in Part D below.

D. LOSS AND DAMAGE

36. As a result of the foregoing matters, the Plaintiff has suffered the following losses and damages:

a. An imminent loss and a loss of reputation and goodwill domestically and internationally;

b. A loss of business and/or business opportunities;

c. A loss of the ability to conduct business deals stems from the announcement made by the Defendant regarding the Notice of Suspension dated 19.10.2023;

d. A loss of confidence in the market from the partners, shareholders, investors and financial institution.

[15] The reliefs sought in the suit are as follows;

AND the Plaintiff claims from the Defendant:

a. A declaration that the Defendant has breached the contractual agreements;

b. An order for reinstatement of services, compensation for losses incurred due to the unfair pricing and service suspension;

c. Damages in lieu of the rescission of the contractual agreements;

d. General damages to be assessed;

e. Exemplary damages to be assessed;

f. Interest at the rate of 5% per annum from the date of judgment until the full settlement of the judgment sum;

g. Costs; and

h. Such further and/or other reliefs that this Honourable Court deems fit and proper to grant.

THE ACCESS AGREEMENT

[16] For ease of reference, we have reproduced the following conditions (duly highlighted and underlined) in the access agreement (note: the defendant is described as 'MYTV' or 'Access Provider' whilst the plaintiff is described as

'Access Seeker'):

1.2 Principles of Non-Discrimination

1.2.1 MYTV and Access Seeker agree and acknowledge that the governing principle of this Agreement is that the Parties are, in respect of the provision of Service, is in an operator-to-operator relationship pursuant to Section 4 of MSA.

1.2.2 Consistent with section 149(2) of the Act, access to Service provided by an Access Provider to the Access Seeker shall be:-

(a) of at least the same or more favourable technical standard and quality as the technical standard and quality provided on the Access Provider's Facilities and Services, and

(b) on an equitable and non-discriminatory basis.

...

2.3 The Parties hereby agree and acknowledge that *this Agreement in its entirety shall only be effective and enforceable upon registration of the relevant portion of this Agreement (which requires registration) with the Commission pursuant to section 150 of the Act.*

...

8.8 Notwithstanding anything to the contrary, *in the event a Party breaches any of its obligations under this Agreement, the other Party shall, without prejudice to any of its rights and remedies under this Agreement and under law, have the absolute discretion to* immediately seek urgent interlocutory action which shall include but not be limited to:-

(a) *preventing such further breaches from occurring*:

(b) *preventing the continuation of the said breach* and/or

(c) *requiring the Party in breach to comply with their obligations under this Agreement, without the necessity of first exercising any of its rights herein*. For the avoidance of doubt, Conditions 8.2, 8.3, 8.4 and 9 *shall not preclude the other Party from immediately seeking urgent interlocutory action* under this Condition 8.8.

...

CONDITION 9-DISPUTE RESOLUTION PROCESS

9.1. Introduction

9.1.1 Subject to Condition 9.2.3, an Access Provider and an Access Seeker shall adopt and comply with this dispute resolution procedure in relation to any dispute which may arise between an Access Seeker and Access Provider in relation to or in connection with the supply of any Services ('Access Dispute').

9.1.2 The following dispute resolution mechanisms are governed by this Condition:

(a) Inter-party working groups; and

(b) specific resolution of disputes, being:

(c) technical disputes (which must follow the procedures set out in Condition 9.5 if they cannot be resolved through the application of the general dispute resolution provisions in Conditions 9.3 and 9.4);

(i) Billing Disputes, which must follow the procedures set out in Condition 9.6;

(ii) or any other types of disputes which, if cannot be resolved through the application of the general dispute resolution provisions in Conditions 9.2. 9.3 and 9.4, must be referred to the Commission for resolution.

9.1.3 A dispute between the Parties regarding any matter dealt with under this Agreement shall first be attempted to be resolved by good faith negotiation between the Parties in accordance with this Agreement.

9.1.4 All disputes referred to the Commission pursuant to this Agreement shall be dealt with in accordance with the Act. Where the decision of the Commission is appealed in the Appeals Tribunal under the Act, *the decision of the Appeals Tribunal shall be final and binding subject always to the right of judicial review contained in the Act*. For the avoidance of doubt, the Commission will decide a dispute if it is satisfied that:

(a) the Parties will not reach agreement, or will not reach agreement in a reasonable time:

(b) the notification of the dispute is not trivial, frivolous or vexatious; and

(c) the resolution of the dispute would promote the objects in the Act.

9.2 General

9.2.1 *Until expiry of the dispute resolution procedures set out herein,* a Party may not commence court proceedings relating to that dispute, other than an application for purposes set out in Condition 9.2.2. Nothing in this Condition 9.2.1 shall be construed as ousting the jurisdiction of any court.

10.2 Governing Law

10.2.1 This Agreement and the transactions contemplated by it are governed by the laws of Malaysia.

10.2.2 In the event of:

(a) a Party seeking urgent interlocutory relief in respect of any matter, or

(b) a Party seeking relief in respect of the other Party failing to comply with the dispute

(c) resolution process set out in Condition 9; or a Party seeking relief in respect of a manifest error or mistake of law of the arbitrator (be it the Technical Expert or the Commission), established by the Parties pursuant to any dispute resolution procedures agreed in writing, or

(d) a Party after failing to resolve the dispute via the Inter-Party Working Group:

(e) each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the Courts of Malaysia for such interlocutory relief and equitable remedies. (Emphasis and underlining added.)

CORRESPONDENCE (PLAINTIFF/DEFENDANT/MCMC)

[17] In the course of the dispute between the plaintiff and defendant arising initially out of the plaintiff's default of in payment obligation under the access agreement which then morphed into a complaint that the defendant had abused its monopolistic position, inequity of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices and breach of contract, various letters were exchanged between the parties (plaintiff, defendant and MCMC). For present purposes, we think that it would suffice if we were to refer only to the following correspondence. We start with the plaintiff's letter to defendant (*dated 9 August 2023*) (copied to the Minister and to MCMC);

9 August 2023

MYTV Broadcasting Sdn. Bhd.

2271, Jalan Usahawan 2,

Cyber 6, 63000 Cyberjaya,

Selangor Darul Ehsan.

Attention: Mr Richard Kitts,

Group CEO Altel Holdings

Dear Mr. Kitts,

RE: UNFAIR BUSINESS PRACTICES IN CARRIAGE CHARGES BY MYTV BROADCASTING SDN. BHD. ('MYTV')

Based on discussions held between Awesome Broadcasting Sdn. Bhd. ('Awesome TV'), represented by Johan Ishak and Mazlan Mahdi; and MYTV, represented by Mr Richard Kitts and Azlina Yusof, on 2 August 2023 as well as continuous communication of both parties subsequently, the below matter has come to our understanding:

BACKGROUND

There have been different pricing structures applied by MYTV to the various Free-to-Air ('FTA') Television ('TV') station operators in the industry. MYTV had represented that the difference in pricing is due to whether the transmission is High Definition ('HD') or Standard Definition ('SD'), for which, the former is priced higher almost double to the latter (ie Approximately RM6 million for the former and RM2.5 million for the latter).

It was also represented that some pricing is dependent upon any bulk deal with network of stations and/or 'Special Initiative Pricing' given to new FTA TV station as early as 2021 even when those FTA TV stations are operating at HD transmission. Awesome TV went on air on 3 August 2020 and in the year 2021, it was still approximately a one-year old FTA TV station on board MYTV; hence, essentially still a new TV station charged at RM6 million per annum that is NOT reflecting the 'Special Initiative Pricing'. In addition, MYTV is unwilling to allow Awesome TV a pragmatic payment term and had threatened to suspend Awesome TV's transmission on MYTV.

In 2023 Awesome TV has paid a sum of RM2.5 million and in total a sum of RM15 million since our first airing on 3 August 2020; demonstrating our commitment.

Awesome TV is/was the only truly private business venture in the Malaysian FTA TV industry under the Digital Terrestrial TV Broadcasting ('DTTB') that is/was not belonging to any Government (Federal or State or Government-Linked Companies) and/or any incumbent groups of media networks.

UNFAIR BUSINESS PRACTICES: UNLEVEL PLAYING FIELD AND UNJUST MONOPOLY

Awesome TV believes that the differences in pricing imposed by MYTV (RM6 million to Awesome TV versus RM2.5 million to some other FTA TV stations) are significant economically putting Awesome TV (On Channel 112 on MYTV), at an 'Unfair Business Practices' environment premised on the 'Unlevel Playing Field' position that Awesome TV is being put under due to the significant price disparity; and the 'Unjust Monopoly' position that MYTV is in as the sole service provider for FTA TV transmission in the country that has impaired Awesome TV's ability to negotiate business terms fairly.

AFFIRMATIVE ACTIONS REQUIRED

1. To arrive at a pragmatic payment term for Awesome TV to pay amounts outstanding to MYTV,
2. To allow transmission of Awesome TV on Channel 112 of MYTV to continue, and
3. To initiate retrospective adjustments to the prices charged to Awesome TV from 2020 to current reflecting a fair position vis-à-vis the 'Unfair Business Practices' matters raised above.

We seek your consideration to address the matter to arrive at a fair business practice, failing which, we will consider taking the necessary steps involving authorities relevant to DTTB and/or FTA TV Industry in Malaysia, particularly on MYTV's conduct as the monopoly service provider for DTTB/FTA TV industry.

Johan Ishak

Managing Director

Awesome Broadcasting Sdn. Bhd.

[18] Next, we refer to the defendant's letter to the plaintiff (*copied to the Minister and MCMC*):

Date: 10 August 2023

AWESOME BROADCASTING SDN BHD

(formerly known as SNR Multi Tech Sdn Bhd)

(Co. No.200301014463/616883-X)

Level 18, Menara 2,

Menara Kembar Bank Rakyat,

No. 33 Jalan Rakyat,

50470 Kuala Lumpur

Attention: *JOHAN ISHAK*

Managing Director

Dear Sir,

RE: UNFAIR BUSINESS PRACTICES IN CARRIAGE CHARGES BY MYTV BROADCASTING SDN BHD

We refer to the above matter and your letter to us dated 9 August 2023.

2. We reviewed your statements regarding Unfair Business Practices and find them to be incorrect as explained on a number of occasions. We are not agreeable to your assertations in the said letter quoting among others Unfair Business Practices in Carriage Charges, Unlevel Playing Field and Unjust Monopoly by MYTV. We would like to reiterate the content in our previous letter to you dated 7 August 2023 wherein we are adamant that MYTV practices equal treatment to all Content Application Service Providers ('CASPs').

3. MYTV charges standard access fees at RM6 Million per year per HD Channel and RM2.5 Million per year per SD Channel. MYTV at our discretion offers a volume discount on the access fees for the CASP that subscribes to more channels under MYTV's DTT services.

4. There is no discrimination towards any CASP in our business practice and MYTV practices fair dealing and conduct *our business with integrity. Our DTT Services are regulated services governed by the Malaysian Communications and Multimedia Commission ('MCMC').* We would like to emphasize that MYTV Access Fees are regulated under the MCMC's Mandatory Standard Access Pricing (MSAP). MSAP ensures that the Access Fee is a transparent and publicly shared pricing structure, aimed at promoting accessibility and affordability for access seekers/broadcasters. It is worth noting that *the current access pricing for both SD & HD channels offered to all broadcasters is notably lower than the MSAP rates prescribed by MCMC. Therefore, MCMC is aware of the pricing tier for both our HD and SD Channels.* In fact, MCMC has to approve the pricing and agreements signed with CASP for our DTT Services.

5. We wish to highlight that Awesome TV came on board with us from August 2020. This was a period prior to the incentives provided by MCMC for CASPs. *The incentives were issued by the MCMC in November 2021. It was only approved for new CASPs that come on board after such period. MYTV was not allowed to give any preference to any CASP nor was it in MYTV's discretion to utilize the incentives to CASPs that do not fall within the permitted group of CASPs* (ie the new CASPs that came on board after the issuance of the incentives in November 2021).

[19] The next letter is the plaintiff's letter dated 9 October 2023 to the MCMC and the defendant:

9 October 2023

Malaysian Communication and Multimedia Commission ('MCMC')

MCMC HQ, MCMC Tower 1, Jalan Impact,

Cyber 6, 6300 Cyberjaya

Selangor Darul Ehsan

Attention: Dato' Zulkarnain Yasin (Chief Officer, Regulatory Sector)

MYTV Broadcasting Sdn Bhd ('MYTV') 2271, Jalan Usahawan 2,

Cyber 6, 63000 Cyberjaya,

Selangor Darul Ehsan.

Attention: Mr Richard Kitts (Group CEO)

Dear Dato' Zulkarnain & Mr Kitts,

RE: AWESOME BROADCASTING SDN BHD ('AWESOME TV') ON MYTV PLATFORM

First and foremost, we acknowledge MCMC's steps taken to address issues arising from the meeting held on 5 October 2023 between MCMC, Awesome TV and MYTV. We have received MYTV's letter dated 6 October 2023 to Awesome TV proposing a way forward. Our responses to the proposal are as follow:

1. We welcome MYTV's agreement to enter into a Standard Definition ('SD') Access Agreement with Awesome TV as earlier requested by Awesome TV at RM2.5 million per annum. Hence, it would be appropriate for both Awesome TV and MYTV to expedite the necessary process to perfect the said SD Access Agreement commencing November 2023.

2. We disagree to make settlement payment based on the values invoiced by MYTV to date premised on the issues raised during the 5 October 2023 meeting. Hence, the SD Access Agreement should not be subjected to the said invoices. Herein, we put forth our salient points per below, for MCMC's further deliberation and intervention for a fair and a level playing field landscape for Awesome TV:

a. We have been informed by MYTV that there are networks of TV stations that have received discounts for services rendered by MYTV on the basis of volume deal. We strongly believe that discounts should also be given to Awesome TV on the grounds of the absence of economies of scale of MYTV platform to Awesome TV as evident by empirical data by Nielsen TV Audience Measurement that revealed that MYTV platform only contributes approximately 20% of the audience measurement to the Free-to-Air ('FTA') 211 TV stations particularly Awesome TV.

b. We have also been informed by MYTV that some new TV stations were also given discounts for their infant status in the industry as subsidised by MCMC Awesome TV is also a new TV station that commenced transmission on 3 August 2020. A mere reference to a commencement date for such discount/subsidy has unfairly excluded Awesome TV from that privilege and has put Awesome TV at an economically disadvantaged position. In substance, Awesome TV is a new TV station and had done significant amount of promotion for MYTV since 2020 without any marketing cost subsidies from MYTV nor MCMC.

...

d. MYTV has a monopoly advantage of being the sole digital terrestrial transmission service provider to the Malaysian FTA TV industry. With the high carriage fees charged to Awesome TV and the unwillingness to offer discounts, MYTV has

A exercised a monopolistic behaviour that exposes Awesome TV to an unfair business practice. This monopolistic condition also extends beyond transmission services whereby MYTV shares the same ultimate majority owners with another large network of TV stations in Malaysia making it in a position of conflict of interest. (Emphasis added.)

B

[20] We then refer to MCMC's letter dated 12 October 2023 to the plaintiff:

Date 12 October 2023

AWESOME BROADCASTING SDN BHD

C [Company Registration No. 616883-X]

(Formerly known as SNR Multi Tech Sdn Bhd) Level 18, Menara 2

Menara Kembar Bank Rakyat No 33, Jalan Rakyat

50470 Kuala Lumpur

D Attn: YBhg. Dato' Adam Bin Mohamed Ilyas

Chief Executive Officer, Awesome Broadcasting Sdn Bhd

YBhg. Dato',

E *RE: COMPLAINT BY AWESOME BROADCASTING SDN. BHD. AGAINST MYTV BROADCASTING SDN BHD ON UNFAIR BUSINESS PRACTICES*

Reference is made to the letters from Awesome Broadcasting Sdn. Bhd. ('ATV') to the Malaysian Communications and Multimedia Commission ('MCMC') dated 28 July 2023 and 8 August 2023, and the letter from ATV to MYTV Broadcasting Sdn Bhd ('MYTV') dated 9 August 2023.

F 2. MCMC has carried out its assessment of ATV's allegations against MYTV, namely, on unfair carriage fees, suspension of service and inadequate TV household coverage. MCMC takes note that ATV is requesting for a pragmatic payment term, continuity of service and retrospective adjustments from 2020 to reflect fair charges.

G 3. Following the discussions held and based on the evidence provided by both parties, (MCMC's findings are as follows:

(i) *MYTV does not appear to be engaging in any anti-competitive conducts that has, or may have, the effect of substantially lessening competition in the television broadcasting market, as the price reduction offered by MYTV to some free-to-air ('FTA') broadcasters is part of a promotional strategy approved under the stimulus grant to encourage new broadcasters on MYTV's platform.* The charges imposed on ATV by MYTV are lower than the regulated price in the Mandatory Standard on Access Pricing for channel and bandwidth charges. Thus, ATV is already enjoying discounted pricing;

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I (ii) Based on the evidence that presented by MYTV, ATV has an outstanding payment of RM4,926,410.97 which comprise of six (6) months access fees from February 2023 until July 2023 of RM3 million, late payment charges of RM426,410.97 from May 2022 until February 2023 and a sum of RM1.5 million for the security deposit. Despite having revised the payment plans and granting extension of time, ATV had failed to honour

the payment plan. In view of this, MYTV had informed ATV that it may suspend ATV services due to default payment. MYTV further highlighted that the existing access agreement that is due for renewal has not been signed by ATV; and

(iii) We take note of ATV's allegation on inadequate TV household on MYTV's platform. We wish to inform that viewers on FTA platform have increased and MYTV will continue to carry out aggressive promotional activities to achieve the target of 7 million viewers by end of 2023, as set by the National Digital Taskforce.

4. Based on the above findings, *we are of the view that ATV's allegations of unlevel playing field and market failure are unsubstantiated.*

Thank you,

Yours faithfully,

TAN SRI MOHAMAD SALIM BIN FATEH DIN

[21] Then comes MCMC's letter to the defendant pertaining to the suspension of DTTS which reads as:

Date: 17 October 2023

MYTV BROADCASTING SDN BHD ('MYTV')

2271, Jalan Usahawan 2

Cyber 6, 63000 Cyberjaya Selangor

(Attn: Puan Azlina Mohd Yusof, Chief Operating Officer)

Dear Madam,

SUSPENSION OF DIGITAL TERRESTRIAL TELEVISION ('DTT') SERVICE OF AWESOME BROADCASTING SDN BHD (FORMERLY KNOWN AS SNR MULTI TECH SDN BHD)

We refer to your letters dated 18 August 2023, 11 September 2023 and 10 October 2023 on the above matter.

2. We take note that Awesome Broadcasting Sdn Bhd ('Awesome TV') has discontinued the payment for the DTT service rendered by MYTV after April 2022 and has an outstanding payment of RM5,038,191.78 which is equivalent to nine (9) months of service. We further noted that despite the outstanding payment, MYTV has continued providing the DTT service to Awesome TV to date and has accommodated Awesome TV's request on numerous occasions for deferment of payment.

3. In line with subsection 5.14.6 of the Commission Determination on the Mandatory Standard on Access, Determination No.1 of 2022 ('MSA'), *MCMC has no objection to MYTV's Intention to suspend the DTT service that is currently provided to Awesome TV pursuant to paragraphs 5.14.5(d) and 5.14.5(e) of the MSA.*

4. We acknowledge the communication plan that MYTV has prepared for Awesome TV's viewers which will begin 14 days prior to the actual shutdown and will run 14 days after the shutdown.

5. Please do not hesitate to contact Puan Izyanie Ariffin (Izyanie@mcmc.gov.my at 03 (syamini.segaran@mcmc.gov.my at 03 clarification. 8688 8135) or Ms. Syamini Segaran 8688 8041) If you require further

Thank you.

Yours faithfully,

DATUK ZULKARNAIN MOHD YASIN

Chief Regulatory Officer On behalf of Chairman

[22] Next, we refer to the plaintiff's letter dated 19 October 2023 to MCMC:

Date: 19 October 2023

Y.Bhg. Tan Sri Mohamad Salim Bin Fateh Din

Malaysian Communication and Multimedia Commission ('MCMC') MCMC HQ, MCMC Tower 1, Jalan Impact,

Cyber 6,

6300 Cyberjaya

Selangor Darul Ehsan.

Y.Bhg. Tan Sri,

AWESOME TV'S RESPONSE TO MCMC'S CONCLUSION ON MYTV BROADCASTING SDN BHD ACCESS CHARGES ('MYTV')

First and foremost, Awesome Broadcasting Sdn Bhd ('Awesome TV') acknowledges MCMC's response to our complaint regarding the above matter as per Y.Bhg. Tan Sri's letter dated 12 October 2023. We hereby submit our rebuttal to MCMC's conclusion as follows:

1. *Awesome TV had overpaid to MYTV, as the significant unfavourable excess in price that Awesome TV had paid, is tantamount to a loss of 30 months' worth of MYTV service* had Awesome TV been charged by MYTV at the same price as the other players. The actual price that MYTV is charging Awesome TV is significantly higher than what was charged to other players notwithstanding any price discounts that exist between that actual price versus the Mandatory Standard on Access Pricing. *In addition, Awesome TV was denied subsidy by MCMC for the said Access Pricing fees where other new players were given*. This disparity exposes Awesome TV to an economic disadvantage. To date, we have paid RM15 million at a rate of RM500,000 per month. Had we been charged the same as other players at approximately RM250,000 per month, we would have covered payments for an additional 30 months transmission of the Free-to-Air ('FTA') terrestrial broadcasting. We believe we have been charged the highest by MYTV if compared to all other private and/or non-Government/state owned TV stations.

...

3. *There exists an unfair industrial economic landscape in the Malaysian broadcasting industry due to monopolistic structure*. We understand that in substance, the ultimate owner(s) who control(s) MYTV is/are also controlling the largest network of FTA

TV stations, Media Prima Berhad. The former is a sole and monopoly terrestrial broadcasting infrastructure owner and the latter holds significant share of the advertising expenditure market. Such monopoly significantly impairs other FTA TV stations from fair business negotiations with MYTV. This conflict of interest is real and not merely a perception. in other industries, such position would have been intervened by the Malaysian Competition Commission ('MyCC'). We have been informed by Y.Bhg. Datuk Zulkarnain Yasin of MCMC in a meeting held on 5 October 2023 at MCMC attended by MCMC, Awesome TV and MYTV that for the broadcasting industry, the function of MyCC lies with MCMC. Hence, MCMC is warranted to expeditiously assess the matter critically and take necessary actions.

Consequently, we strongly believe that MCMC should:

(i) *compel MYTV to NOT suspend the broadcasting and transmission of Awesome TV,*

(ii) *allow subsidy for Access Pricing to be given to Awesome TV retrospectively,*

(iii) *compel MYTV to revise the price charged to Awesome TV to address the excessive pricing,*

(iv) *compel MYTV to formulate a better marketing plan for a bigger share of TV audience market that is economically viable including advertising on FTA TV stations such as Awesome TV; and*

(v) *function thoroughly as how MyCC would function vis-à-vis critical assessment of the monopolistic position that MYTV and Media Prima Berhad is enjoying.*

Yours faithfully,

Dato' Adam Ilyas

Chief Executive Officer

Awesome Broadcasting Sdn. Bhd.

[23] The defendant's notice of suspension to the plaintiff is dated 19 October 2023 and reads as follows:

AWESOME BROA.DCASTING SDN BHD

(formerly known as SNR Multi Tech Sdn Bhd)

(Co. No. 200301014463/616883-X)

Level 18. Menara 2. Menara Kembar Bank Rakyat,

No. 33 Jalan Rakyat,

50470 Kuala Lumpur

Attention: JOHAN ISHAK

Managing Director

Dear Sir,

NOTICE OF SUSPENSION

We refer to the above matter and the following references

i. Access Agreement for the Provision of Digital Terrestrial Television (DTT) Services between MYTV Broadcasting Sdn. Bhd. ('MYTV') and SNR Multi Tech Sdn Bhd ('ATV') dated 17 July 2020 for the provision of digital terrestrial television services (DTT Services); and

ii. Letter from MCMC dated 17th October 2022 permitting MYTV to proceed with suspension of DTT Services of ATV.

2. We regret to inform you that as of today, we have yet to receive any payment from you for the Indebted Sum in the amount of *RM5,107,232.86* (including the charges for the provision of the DTT Services for the month(s) of nine (9) and late payment charges calculated as at 18th October 2023).

3. As such, by virtue of Clause 8.3 of the Access Agreement, we hereby give you notice to suspend your access to the DTT Services on 2 November 2023 at 12.01am ('Date of Suspension') ie 14 days from the date of this Suspension Notice.

4. MYTV has been requested by MCMC to inform MYTV's viewers of any channels that will be taken off the air. Pursuant to the aforesaid, we hereby request ATV to run crawlers on your channel or provide us with the necessary written permission to run the crawlers on ATV's behalf, fourteen (14) days before the channel is taken off air as per the suggested script below:

'Saluran ini akan di tamatkan siarannya pada 2hb November 2023 pada jam 12.01 tengah malam'

5. In light of the suspension above, if you fail, neglect and/or refuse to pay the indebted Sum stated above in full within seven (7) days from the Date of Suspension, we shall proceed to terminate the DTT Services and shall take all necessary legal action against you without further notice to recover the Indebted Sum in full. All legal costs incurred by MYTV in relation to the recovery of the Indebted Sum are to be borne by you.

Thank you.

Yours sincerely,

For and on behalf of

MYTV BROADCASTING SDN BHD

RICHARD KITTS

Group Chief Executive Officer

HIGH COURT — DECISION TO DISMISS ENCL 7

[24] We may now turn to the JC's decision. The JC examined the facts pertaining to the dispute between the parties and also alluded to MCMC's involvement. The facts were chronologically narrated by the JC per paras [7] to [25] of his judgment. The JC then summarised the arguments that were put forward by the parties as follows:

THE PLAINTIFF'S BASIS FOR INTERIM INJUNCTION

[26] The plaintiff contends that there are bona fide serious issues to be tried and that an interlocutory injunction is warranted to maintain the status quo pending the determination of these issues at trial.

[27] The plaintiff submits the bona fide serious issues are 'inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices, and breach of contract' The plaintiff says it has substantiated its claims with factual assertions demonstrating a clear cause of action against the defendant (plaintiffs written submissions enclosure 19 paras 22 and 25).

[28] The plaintiff relies on *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 3 BLJ 254 (CA) for general principles on the granting of interim injunction pending trial.

[29] For cases in support of serious issues to be tried — ie the authorities demonstrate that reliance on the concept of 'absolute discretion' is no longer in law absolute but rather subject to legal scrutiny-the plaintiff relies on cases like:

(a) The English Court of Appeal case of *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA CIV 116; [2008] All ET (D) 331 (Feb) at [66] that 'a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused'

(b) *Brogden v Investec Bank PLC* [2014] EWHC 2785 (Comm); [2014] IRLR 924, that 'a discretion ... is subject to the implied constraints that it must be taken in good faith, for proper purposes and not in an arbitrary, capricious or irrational manner.'

(c) The United Kingdom Supreme Court case of *Braganza v BP Shipping Ltd & Anor* [2015] UKSC 17 at '[18] ... It is not for the courts to re-write the parties' bargain for them, still less to substitute themsel ves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.

(d) The New Zealand High Court case of *Vero Insurance New Zealand Limited v Fleet Insurance & Risk Management Limited HC Auckland CIV* [2007] NZHC 214529 at '[42] ... I do not consider that the words 'absolute discretion' [in a contract] necessarily exclude the application of a duty of good faith'.

(e) The UK Court of Appeal case of *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 19430 which said '... A theme that runs through our law of contract is that the reasonable

A expectations of honest men must be protected. It is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract ...'.

[30] The plaintiff submits that damages would not be an adequate remedy to compensate the plaintiff if the interim injunction is not granted by this Honourable B Court. The plaintiff relies on *Baskin Robbins International Co v Avonday Sdn Bhd* [1992] 2 CLJ 1198 p 205 E-F Shaik Daud Ismail J who held:

> The second criteria for the Court to consider is whether damages would be an adequate remedy. On the evidence before me I am of the view that *if the plaintiff* C *succeeds at the trial without this injunction, it would not be possible to assess the amount of damages they would have suffered as it would not be possible to account the number of customers that they had thereby been deprived of. I do not consider therefore that in the circumstances of this case damages would be an adequate remedy* ... (Emphasis added.)

D ...

[31] The plaintiff also submits that the balance of convenience unequivocally favours the granting of the injunction.

THE DEFENDANT'S REBUTTAL

E [32] The defendant's lead counsel Mr Gopal Sreenevasan opposes the injunction (see written submission encl 30 para 4) on the following grounds:

i. As the plaintiff concedes in its affidavit, all its complaints have been considered and rejected by MCMC the regulator who administers and regulates the MCMC Act. The agreement which is the subject matter of F this suit is registered under the MCMC Act and both the plaintiff and defendant are licensed under the MCMC Act. The MCMC has also approved the suspension of the plaintiff. As a result, the defendant submits that this injunction in effect interferes with the regulator and has the effect of restraining it from carrying out its obligations. The plaintiff has used the wrong forum to do so. [See Enclosure 15-page 44, Enclosure 4-page G 11, Enclosure 17-page 234]. ['the wrong forum argument']

ii. The plaintiff has failed to name the MCMC as a defendant in this proceeding, despite the fact that the MCMC is an interested and affected party. The law is that the absence of a necessary party means that there is no serious issue to be tried.

H

iii. Given that the plaintiff is providing content on the defendant's platform, its damages (from for example, advertising or subscriptions) are clearly determinable and adequate; and

iv. Accordingly, given the public interest in ensuring that the MCMC can I continue with its statutory functions, the balance of convenience must tilt against the plaintiff.

[25] The JC then applied the legal principles to the facts of the case and dismissed encl 7. The JC's reasons for dismissing encl 7 are contained in paras

[33]–[61] of his judgment and they read as follows:

MY ANALYSIS

[33] I begin with the law on interim injunction.

THE LAW ON INTERIM INJUNCTION

[34] In essence, the court will exercise its discretion to grant an interlocutory injunction to a plaintiff if the following considerations are satisfied:

(a) The plaintiff has satisfied the court that there is a bona fide and serious question to be tried in respect of the plaintiff's cause of action against the defendant. To determine whether there is a bona fide and serious question to be tried, the judge need not make any determination on the merits of the claim. It is *sufficient if the judge identifies the issues raised and decides whether these are serious enough to merit a trial*. Thus, if the plaintiff fails to show there is a bona fide and serious question to be tried in respect of the plaintiff's cause of action against the defendant, the court shall refuse to grant the interlocutory injunction. There is no necessity to proceed to the next consideration.

(b) *Damages are not an adequate remedy for the plaintiff*. Damages will not be an adequate remedy *if it is not possible to assess the amount of damages the plaintiff would have suffered if he wins at trial* (see *Baskin Robbins International Co v Avonday Sdn Bhd* [1992] 2 CLJ 1198 p 205 E-F Shaik Daud Ismail J). Damages will also not be an adequate remedy even if the damages that the plaintiff would suffer are monetary in nature and quantifiable if the defendant is not in a position or does not have the financial means to pay the damages.

(See *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130; [2003] 1 CLJ 153; [2002] 2 MLRA 258; [2003] 1 AMR 378 (CA), at 144 C-D, quoting Lord Diplock in *American Cyanamid Co v Ethicon Ltd & Ors* [1975] 1 All ER 504 and *Scomi Group Bhd v Gelombang Global Sdn Bhd & Anor and another case* [2020] 12 MLJ 708; [2020] 9 CLJ 122; [2020] MLRHU 377; [2020] 5 AMR 808 at [113] Ong Chee Kwan JC.)

(c) The balance of convenience lies in favour of a grant of an interlocutory injunction. In this context, *the judge must consider where the justice of the case lies. In making his assessment, he must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. The objective is to produce a just result for the period between the decision on the application and the trial proper*; and

(d) There is no policy or equitable ground to refuse an interlocutory injunction.

(See *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 3 BLJ 254 (CA) Gopal Sri Ram JCA and *Kwong Hing Enterprises Sdn Bhd & Anor v Diamond C Management Corporation* [2023] CLJU 346; [2023] 1 LNS 346; [2023] MLRHU 287 HC at [32].)

SHOULD I GRANT THE INTERIM INJUNCTION?

Is there a bona fide and serious question to be tried?

[35] I am of the view that *the plaintiff has failed to satisfy the court that there is a bona*

fide and serious question to be tried in respect of the plaintiffs' cause of action against the defendant.

[36] In my view, the plaintiff has prematurely filed the writ action and the interim injunction in support of the writ action. The defendant calls this error of the plaintiff the wrong forum argument. The relevant principle of law is-A person shall not apply to the court for reliefs unless that person has first exhausted all other domestic remedies available to him under an applicable Act.

The law on exhaustion of all domestic remedies before filing in court

[37] I consider the law on exhaustion of all domestic remedies before filing in court settled law.

[38] What this means is that where a statute has provided for a further internal remedy to an aggrieved party, then recourse must first be had to that grievance mechanism. In other words, *the aggrieved party must exhaust that internal remedy first before running to the courts for relief*.

(See *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal* [2014] 4 MLJ 377; [2014] 3 CLJ 733 (CA), *Ta Win Industries (M) Sdn Bhd v Ketua Pengarah Kastam Malaysia & Anor* [2021] MLJU 157 at [20] and [25](c) and *Malaysia Airports Sdn Bhd v My Jet Xpress Airlines Sdn Bhd* [2023] MLJU 2236 at [61]]

[39] In *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal* [2014] 4 MLJ 377; [2014] 3 CLJ 733 (CA), Abang

Iskandar JCA said;

> [18] Having perused that provision, we would agree with learned SFC that such recourse could only be had after the respondent taxpayer had exhausted the available remedy as provided for by Parliament within the four corners of the Sales Tax Act 1972.
>
> That would necessarily mean that the respondent taxpayer must have exhausted its appeal remedy with the Director General of Customs in respect of the impugned Notice as envisaged under s 68 of the Sales Tax Act 1972. While s. 141N seems to suggest that the aggrieved party may go to the High Court, it does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director General.
>
> [19] Again, with regard to the statutory remedy as contained under s 68 of the Sales Tax Act 1972 we are of the view that the position in such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41; [1970] CLJU 80; [1970] 1 LNS 80, *Government of Malaysia & Anor v Jagdis Singh* [1987] CLJ Rep 110; [1987] 2 MLJ 185, and *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505. These cases have decided that *where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to*

exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief. (Emphasis added.)

[40] Rozi Bainon JC in the recent case of *Malaysia Airports Sdn Bhd v My Jet Xpress Airlines Sdn Bhd* [2023] MLJU 2236 applied the Court of Appeal decision of *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal* [2014] 4 MLJ 377; [2014] 3 CLJ 733 (CA), Abang Iskandar JCA. This is what the learned judicial commissioner said:

[61] This Court emphasized it again that:

(a) the Commission is an entity who possesses comprehensive knowledge of aviation matters and is fully equipped and clothed with the necessary skills and powers to decide on the disputes as enumerated above.

(b) this Court should not rob the Defendant's statutory right to refer the disputes/issues/questions to the Commission.

(c) this Court should not allow the Plaintiff to bypass and or to circumvent section 74 of Act 771.

(d) ...

(e) in the case of *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd and Ors And Another Appeal* [2014] 4 MLJ 377; [2014] CLJU 264; [2014] 1 LNS 264 the Court of Appeal held that:

... with regard to the statutory remedy ... we are of the view that the position in such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41; [1970] CLJU 80; [1970] 1 LNS 80, *Government of Malaysia & Anor v Jagdis Singh* [1987] CLJ Rep 110, and *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505. These cases have decided that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief.

[62]...

[63] The intention of Act 771 is clearly to provide for the players in the aviation industry to commence the grievances to the Commission first before filing the case in the court.

APPLICATION OF LAW TO FACTS

[41] Can the plaintiff contend that it is entitled to file a suit against the defendant alone without exhausting the domestic remedies prescribed by Parliament under the MCMC Act on the ground that it is not suing the MCMC? In short, can the plaintiff carve out its case against the defendant from its case against MCMC?

[42] The answer is No as *the plaintiff's case against the defendant is inextricably linked to its case against MCMC as the regulator*. The plaintiff's contention is not even

supported by its own supporting affidavit (encl 4) filed before me. This is what the plaintiff had said in its encl 4 paras 14 to 17–14. On 9 October 2023, the plaintiff wrote a letter to the MCMC and the defendant expressing their willingness to enter into a SD access agreement with the defendant at RM2.5m per annum starting November 2023. However, the plaintiff contested the settlement payment based on the invoiced values of the defendant, asserting that the SD Access Agreement should not be tied to these invoices ... A copy of the letter from Awesome Broadcasting Sdn Bhd dated 9 October 2023 is marked and exhibited as 'ATV-6'

15. On 12 October 2023, the MCMC responded to the plaintiff's letter dated 9 October 2023, albeit addressing only certain issues raised therein, and did so in an unsatisfactory manner. A copy of the letter from MCMC dated 12 October 2023 is marked and exhibited as 'ATV7'

16. *On 19 October 2023, the defendant issued a notice of suspension to the plaintiff in accordance with cl 8.3 of the access agreement dated 17 July 2020, indicating the suspension of DTT services effective from 2 November 2023 at 12.01am, due to the non-payment of the purported indebted sum amounting to RM5,107,232.86 as of the said date ('Notice of Suspension').* Further, *the defendant received permission from the mcmc before issuing the notice of suspension to the plaintiff ... a copy of the notice of suspension dated 19 October 2023 is marked and exhibited as 'ATV-8'*

17. On 19 October 2023, the plaintiff responded to the letter dated 12 October 2023 from the MCMC by stating the following:

(a) the plaintiff claims an overpayment to the defendant, totalling a loss of 30 months of service at the rate charged to other entities. This discrepancy, coupled with a lack of subsidy from MCMC, places the plaintiff at an economic disadvantage, having paid RM15 million to date at RM500,000 per month;

(b) ...

(c) the monopolistic structure within the Malaysian broadcasting sector, ..., hinders fair business negotiations with the Defendant. This situation calls for MCMC's critical intervention similar to the role Malaysian Competition Commission plays in other sectors;

(d) *the Plaintiff urges the MCMC to take several actions: prevent the Defendant from suspending the broadcasting of the Plaintiff, approve a retrospective subsidy for Access Pricing for the Plaintiff, direct the Defendant to adjust the pricing to align with other entities*, ... A copy of the letter from Awesome Broadcasting Sdn Bhd is marked and exhibited as 'ATV-9'. (Emphasis added.)

[43] From the above, it is clear *the plaintiff's grievance is inequitable treatment and lack of action by MCMC as a regulator*. To recap, this is what the Managing Director of the plaintiff affirmed on oath in his affidavit:

16(d) *the Plaintiff urges the MCMC to take several actions: prevent the Defendant from suspending the broadcasting of the Plaintiff, approve a retrospective subsidy for Access Pricing for the Plaintiff, direct the Defendant to adjust the pricing to align with other entities* ... (Emphasis added.)

[44] *The plaintiff has availed themselves of the procedure of having their dispute heard and decided by the MCMC under s 86 of the MCMC Act. The MCMC has rejected the plaintiff's complaints as being unsubstantiated.*

(See the plaintiff's affidavit in support encl 4 at paragraph.)

15. A copy of the letter from the MCMC dated 12 October 2023 is marked and exhibited as 'ATV7'.

[45] *The proper appeal mechanism under s 120(1) of the MCMC Act is to challenge MCMC's decision at the Appeals Tribunal (If it's a decision or direction of the MCMC) or to appeal to the Minister (If it's a determination by the MCMC).*

[46] *It is only when the appeal to the Appeals Tribunal or to the Minister as the case may be fails that the plaintiff has the right to file for judicial review pursuant to s 121 of the Act, or to file for other court reliefs against the defendant and MCMC as it deems fit.*

[47] This is clear from ss 120 and 121 of the MCMC Act which read:

> 120 (1) Subject to subsection (2), a person who is the aggrieved or whose interest is adversely affected by a decision or direction (but not a determination) of the Commission made pursuant to the performance its powers and functions under this Act or its subsidiary legislation, may appeal to the Appeal Tribunal for a review of the merits and the process of certain decisions or directions of the Commission, unless the matter is not subject to an appeal to the Appeal Tribunal.
>
> (2) Subject to subsection 17(1), the Minister may determine the decisions or directions of the Commission which are not subject to appeal to the Appeal Tribunal under subsection (1).'
>
> 121 (1) A person affected by a decision or other action of the Minister or Commission may apply to the court for a judicial review of such decision or other action.
>
> (2) A person shall not apply to the court for a judicial review unless that person has first exhausted all other remedies provided under this Act. (Emphasis added.)

[48] On this ground alone, the application for injunction can be dismissed. I now consider the other grounds.

No serious issue to be tried

[49] *It is an undisputed fact that the plaintiff has failed to pay arrears of RM4,926,410.97 owed to the defendant*. This is what MCMC said in its letter to the plaintiff which I have set out above:

> Based on the evidence that presented by MYTV, ATV has an outstanding payment of RM4,926,410.97 which comprise of six (6) months access fees from February 2023 until July 2023 of RM3 million, late payment charges of RM426,410.97 from May 2022 until February 2023 and a sum of RM1.5 million for the security deposit. Despite having revised the payment plans and granting extension of time, ATV had failed to honour the payment plan. In view of this, MYTV had informed ATV that it may suspend ATV services due to default payment.

[50] The plaintiff alleged it is a victim of, and I quote, '*inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices, and breach of contract*' unquote (see plaintiffs written submissions encl 19 para 25). The plaintiff's end game is that it is not obliged to pay the arrears.

[51] The short answer to this is that all these allegations have been rejected by MCMC. As it is clear the plaintiff is not happy with the findings of the MCMC, it should exhaust its appeal process under the MCMC Act and not run to the court for relief prematurely.

ALL PARTIES AFFECTED BY A COURT ORDER MUST BE MADE PARTIES TO THE SUIT

[52] A further ground to dismiss the plaintiff's application is the principle that 'All parties affected by a court order must be made parties to the suit'.

[53] This principle can be seen from the Court of Appeal decision in *Saujana Resort (M) Bhd v Chin Cheen Foh & Ors And Another Appeal* [2021] 3 MLJ 873; [2021] 3 CLJ 71 (CA) which held at [41]:

> It is trite that in an application for declaration, all parties who would potentially be affected by such an order must be before the court. An action for a declaration is an important device for ascertaining and determining the rights of parties. And it is settled that when a declaratory order is sought, all interested parties must be before the court. See dicta of Viscount Maugham in *London Passenger Transport Board v Moscrop* [1942] AC 332 at 345 (HL) which was adopted by the Supreme Court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors And Other Appeals* [1997] 3 MLJ 32; [1997] 4 CLJ 253 p 282 vide Lord Radcliffe's observation in *Ibeneweka v Egbuna* [1964] 1 WLR 219, p 226. See also *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206; [1996] 4 CLJ 141; [1996] 1 MLRA 470; *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trades Unions & Ors* [1990] 3 MLJ 231; [1990] 2 CLJ Rep 218; [1990] 2 CLJ 405 HC; and *Chia Saw Kee & Anor v Huah Leong Holdings Sdn Bhd & Anor* [2003] CLJU 641; [2003] 3 MLRH 46; [2003] 8 CLJ 124 HC for an application of this principle.

[54] I hold that the *failure of the plaintiff to add MCMC as a second defendant is fatal to its application.*

The failure to add a necessary party as a defendant means there is no serious issue to be tried

The law

[55] The *failure by a party applying for an interim injunction to add a necessary party as a defendant means there is no serious issue to be tried.*

(See *Hong Kong Vegetable Oil Company Ltd A v Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13; [1977] CLJU 35; [1977] 1 LNS 35 (OCJ Singapore) Rajah J at pp 15–16 and *Serba Dinamik Holdings Bhd v Ernst & Young Consulting Sdn Bhd (formerly known as Ernst & Young Advisory Services Sdn Bhd)* Ahmad Fairuz Zainol Abidin J at [64–68].

[56] In *Hong Kong Vegetable Oil Company Ltd A v Malin Sirinaga Wicker &*

Ors [1978] 2 MLJ 13; [1977] CLJU 35; [1977] 1 LNS 35 (OCJ Singapore) Rajah J at pp 15–16, held:

> Principle No 1 'provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case'. I interpreted this principle to mean that once the court is satisfied that there is a serious question to be tried then the court is not to follow the previous practice of requiring a plaintiff to show a prima facie case before granting him an interim injunction. Therefore, in the instant case I was of the view that I had first to decide whether there is in fact and in law a serious question to be tried and again in my view *implicit in 'a serious question to be tried' is the question whether the action is properly conceived and whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented. In my judgment, if these elements or any of them are not present then, because of non-compliance with this principle alone, the motion should stand dismissed.* (Emphasis added.)

[57] *Hong Kong Vegetable Oil Company Ltd A v Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13; [1977] CLJU 35; [1977] 1 LNS 35 (OCJ Singapore) Rajah J was recently applied in *Serba Dinamik Holdings Bhd v Ernst & Young Consulting Sdn Bhd (formerly known as Ernst & Young Advisory Services Sdn Bhd)* where Justice Ahmad Fairuz Zainol Abidin held:

> Application not properly conceived
>
> [64] One element crucial for determination is whether all parties affected by the proposed injunction have been named. In essence, it pivots on whether the application was properly conceived.
>
> ...
>
> [66] Apart from the contractual provisions, EYC is obliged under the Bursa Directive and the SCA to report to regulators. As such, any order would clearly affect both regulators and their statutory powers.
>
> [67] In this regard, the Singapore High Court case of *Hong Kong Vegetable Oil Co Ltd v Wicker* and others is instructive: '15. Principle 1 'provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case' interpreted this principle to mean that once the court is satisfied that there is a serious question to be tried then the court is not to follow the previous practice of requiring a plaintiff to show a prima facie case before granting him an interim injunction. Therefore, in the instant case I was of the view that I had first to *decide whether there is in fact and in law a serious question to be tried and again in my view implicit in a serious question to be tried' is the question whether the action is properly conceived and whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented. In my judgment, if these elements or any of them are not present then, because of non-compliance with this principle alone, the motion should stand dismissed*.

A [68] Thus, it is clear to this court that the application has not been properly laid before this court. If the relevant parties are not before the court, the order of this court will not be properly and effectively implemented.'

Application of law to facts

B [58] The *MCMC is both a proper and necessary party*. Absent the MCMC as a defendant, as a matter of law, there can be no serious issue to be tried.

CONCLUSION

[59] In view of my decision on the grounds set out above, I do not propose to consider the rest of the grounds raised by counsel.

C [60] I thank both counsel for their thorough and helpful submissions, both written and oral. The court has been helped immensely by counsel.

DECISION

[61] For the above reasons, I therefore dismiss the application for injunction with D costs of RM40,000 subject to allocatur. Damages to be assessed.

[62] At the plaintiff's oral application made immediately after I delivered orally my decision on 11 January 2024, I have granted an Erinford injunction in favour of the plaintiff effective till 11 March 2024. I then had said 'It is up to the plaintiff's counsel in his wisdom to decide whether to appeal against my decision today or use E the time usefully to resort to the domestic remedy procedure under the MCMC Act.

OUR DECISION

F **[26]** It is clear from the JC's grounds of judgment that the failure by the plaintiff to exhaust the statutory remedy provided under the Act was one of the reasons for dismissing encl 7. In this regard, the JC referred to ss 120 and 121 of the Act, and concluded that the remedies provided under the Act must first be exhausted before applying to the court for relief. According to the JC, this is G underscored by the fact that s 121 of the Act provides,

Section 121

(1) *A person affected by a decision or other action of the Minister or Commission* may apply to the court for a *judicial review* of such decision or other action.

H

(2) *A person shall not apply to the court for a judicial review unless that person has first exhausted all other remedies provided under this Act.*

[27] Therefore, the JC held that the plaintiff was wrong to immediately file I a writ and apply to court immediately for an injunction. The JC applied the well-established principle that a party must exhaust the domestic statutory remedy before approaching the court for relief.

[28] The JC relied on the Court of Appeal's decision in *Pengarah Kastam*

Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal [2014] 4 MLJ 377; [2014] 3 CLJ 733 (CA), where Abang Iskandar JCA referred to *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41; [1970] CLJU 80; [1970] 1 LNS 80 (FC), *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 (SC) and *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505 (FC) and said:

> ... These cases have decided that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief.

[29] It would seem therefore that instead of filing a writ, the proper procedural route for the plaintiff would have been to file an originating summons and apply to the court for a limited injunction to restrain the defendant from implementing the suspension, pending exhaustion of the domestic statutory remedy process under s 120 of the Act.

[30] The JC's second ground for dismissing the application for injunctive relief was that the MCMC was a party (regulator) whose regulatory powers and functions would be affected by the grant of the injunctive relief. As such, the JC held that MCMC was a relevant and necessary party to the suit. Thus, the failure of the plaintiff to name the MCMC as a party to the action meant that there could be no serious question to be tried as a relevant and necessary party was not before the court (see: Justice AP Rajah's decision in *Hong Kong Vegetable Oil Company Ltd A v Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13).

[31] There is no doubt that the plaintiff has taken issue with the conduct of the defendant and they (plaintiff) have claimed to be the 'victim' of 'inequality of bargaining power, discriminatory pricing, unfair contractor discretion, unfair business practices and breach of contract'. But the contemporaneous documents show quite unequivocally that all these issues were duly escalated by the plaintiff to MCMC and sought the latter's intervention. These issues were apparently investigated by MCMC and they found the allegations to be unsubstantiated (see: MCMC's letter dated 12 October 2023 addressed to the plaintiff).

[32] It is important to mention here that the plaintiff took the position that the MCMC letter dated 12 October 2023 was not appealable to the Tribunal under s 120(1) of the Act as it was a *determination* and not a *decision*:

> Section 120

A (1) Subject to subsection (2), a person who is the aggrieved or whose interest is adversely affected by *a decision* or direction (*but not a determination*) of the Commission made pursuant to the performance its powers and functions under this Act or its subsidiary legislation, may appeal to the Appeal Tribunal for a review of the merits and the process of certain decisions or directions of the Commission,
B unless the matter is not subject to an appeal to the Appeal Tribunal.

(2) Subject to subsection 17(1), the Minister may determine the decisions or directions of the Commission which are not subject to appeal to the Appeal Tribunal under subsection (1).

C **[33]** In this regard, s 18 of the Act states:

(1) The Appeal Tribunal may review any matter appeal, on from a *decision* or direction of the Commission *but not from a determination by the Commission*.

D (2) Any decision by the Appeal Tribunal is final and binding on the parties to the appeal and is not subject to further appeal.

[34] In this regard, it is material to note that in the affidavit of Adam bin
E Mohamed Ilyas affirmed on 18 March 2024 (a Director and Chief Executive Officer of the plaintiff) (see: Court of Appeal encl 15), the deponent described the appeal that was lodged to the Appeal Tribunal as an appeal against the MCMC's 'decision'. The deponent stated the following:

Following the availability of the full grounds of judgment from the Kuala Lumpur
F High Court on 21.02.2024, the Applicant also filed a Notice of appeal *against the decision of MCMC dated 12.10.2023 to the Appeal Tribunal on 07.03.2024*. Currently, there has been no sitting for any appeal since the end of January 2024, given that the Chairman of the Appeal Tribunal has retired and a new Chairman has not yet been appointed by the Minister pursuant to section 17(3) of the
G Communications and Multimedia Act 1998. The filing of this appeal at the Appeal Tribunal is without prejudice to the Applicant's rights to appeal to the Court of Appeal. [A copy of the Notice of Appeal dated 06.03.2024 is marked and exhibited as 'ABSB-16']

H **[35]** The plaintiff's appeal to the Tribunal reads as follows;

COMMUNICATIONS AND MULTIMEDIA ACT 1998

COMMUNICATIONS AND MULTIMEDIA (APPEAL TRIBUNAL) (APPEAL PROCEDURE) REGULATIONS 2009

IN THE MATTER OF THE APPEAL TRIBUNAL APPEAL
I
NO. YEAR 2024

Name of the Appellant: Awesome Broadcasting Sdn Bhd Company

Registration Number: 200301014463 (616883-X)

License Number: CASP/I/2000/125

License Type: Content Applications Service Provider

Address: Level 31, MOF. Inc Tower,

No. 9. Persiaran KLCC,

50088 Kuala Lumpur

Telephone Number: +603 2181 6889

E-mail: adamilyas@myatv.my/mazlan@myatv.my

NOTICE OF APPEAL

The Appellant who is aggrieved or whose interest is adversely affected by the decision of the Malaysian Communications and Multimedia Commission *given on the 12th October 2023* appeals to the Appeal Tribunal against the decision of the Commission.

The particulars of the Appeal are as follows:

(a) Particulars of the Decision Appealed against:

(i) This Appeal is against the decision of the Malaysian Communications and Multimedia Commission ('Commission') made under section 86 of the Communications and Multimedia Act 1998, which dismissed the complaint from the Appellant against MYTV Broadcasting Sdn Bhd ('MYTV') for discriminatory pricing practices, unequal application of subsidies, and the unjust exclusion of the Appellant from such benefits;

(ii) This was despite compliance with necessary criteria and substantial investment in the industry by the Appellant;

(iii) The Appellant shall be relying on, *inter alia*, the following grounds in support of this Appeal:

(1) that the Commission failed to consider the unequal and higher charges imposed on the Appellant by MYTV compared to other entities, which were provided discounts and subsidies, resulting in a competitive disadvantage and significant financial losses for the Appellant;

(2) that despite being a nascent entity within the industry and in a similar position to other broadcasters who received governmental subsidies, the Appellant was unjustly excluded from such benefits due to arbitrary criteria set by the Commission and MYTV:

(3) that the Commission overlooked the monopolistic behaviour of MYTV its impact on the Appellant, specifically the high carriage fees and the lack of discounting practices that are available to other entities, which is detrimental to fair competition and the diversity of the broadcasting industry in Malaysia;

(4) that the decision by the Commission disregards the substantial financial and operational impact on the Appellant caused by practices of MYTV, including but not limited to the loss of revenue, audience reach, and market confidence.

...

(c) Relief or remedy sought:

(i) The Appellant, by way of this Appeal, is seeking for, inter alia, the following:

(1) For the Commission to revoke its previous decision and acknowledge the grievances presented by the Appellant regarding discriminatory practices, unfair treatment, and exclusion from benefits;

(2) MYTV to be mandated to revise its pricing strategy to ensure it is fair, non-discriminatory, and comparable to the terms offered to other entities in the broadcasting industry,

(3) The retroactive application of subsidy benefits to the Appellant, similar to those provided to other broadcasters, to rectify past injustices and financial disparities caused by the exclusion;

(4) The Commission to be instructed to address and mitigate the monopolistic actions of MYTV, ensuring equitable carriage fees and discount practices for all entities to promote industry competition and diversity:

(5) The Appellant to be compensated for the substantial financial and operational impacts incurred due to the practices of MYTV.

(ii) Further and/or in the alternative, the Appellant seeks to be granted an abridgment of time to file this Notice of Appeal.

Dated this 6th March 2024

[36] Hence, at least since the 6 March 2024, an appeal had been lodged with the Appeal Tribunal as per s 120 of the Act. But that only means that there is presently a valid and proper appeal against MCMC's 'decision' per their letter dated 12 October 2024 whereby they (MCMC) had rejected the plaintiff's complaints against the defendant.

[37] It was submitted for the plaintiff that the dispute herein entails numerous substantial issues that warrant adjudication, such as inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices, and breach of contract. According to the plaintiff, they have substantiated their claims with factual assertions demonstrating a clear cause of action against the defendant.

[38] As such, it was submitted that there are indeed serious issues to be tried, thus satisfying the threshold legal requirement for the grant of an injunction. See: *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (CA). Having considered the matter, we are satisfied that the issues raised here, namely, inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices, and breach of contract are not frivolous such that they ought to be dismissed *in limine* or rejected outright.

[39] We are cognisant of the plaintiff's contention that the defendant had a discretion with regard to the pricing or allocation of subsidies and that such discretion must be exercised bona fide and reasonably. They relied on several well-known cases touching upon contractual discretion. In response, the defendant's argument was that this was a negotiated contractual price and that there was no contractual discretion as such for the plaintiff to exercise.

[40] Be that as it may, the point remains that there is some degree of opacity in regard to the allocation of the MCMC subsidy and indeed, whether it was the defendant or MCMC which decides on the allocation of the subsidy. If the allocation is by the defendant then this may well involve an element of discretion, which must of necessity be exercised reasonably and equitably, particularly since the agreements are regulated under the Act and must be consistent with the object thereunder, including the need for the DTTS to be provided on an equitable and a non-discriminatory basis (s 149 of the Act).

[41] In this regard, learned counsel for the plaintiff did address us on a number of points as to the subsidies that were given by MCMC and as to the discretion on the allocation of subsidies to CASPs etc. Counsel also said that the cut-off date (November 2021) for entitlement to MCMC's subsidies is also arbitrary and warranted a full trial. In response to the stand taken by MCMC and the plaintiff, that only new CASPs are given the subsidies, the plaintiff maintains that they are a nascent player in the industry and also entitled to be considered for subsidy. On the issue of discrimination, we are mindful of the wordings of s 149(2) of the Act which reads:

> Section 149(2) The access provided by one provider ('the first provider') to another provider under subsection (1), shall be —
>
> (a) of at least the same or more favourable technical standard and quality as the technical standard and quality provided on the first provider's network facilities or network services; and
>
> (b) on an *equitable and a non-discriminatory basis*.

[42] But in the context of an application for equitable injunctive reliefs, we take the view that the issue of serious issue to be tried is not a stand-alone concept as it is intrinsically and inextricably tied up with the question whether the plaintiff has a complete cause of action and whether all the relevant and necessary parties are before the court.

[43] In this regard, it should be note, the first prayer that was sought in the writ was: (i) A declaration that the defendant has breached the contractual agreements; and secondly, (ii) An order for reinstatement of services, compensation for losses incurred due to the unfair pricing and service suspension.

[44] In our view, the question of whether the defendant was in breach, and whether the DTTS should be reinstated, and for compensation for losses due to alleged unfair pricing etc, are all matters which impinge or impact upon the regulatory jurisdiction and function of MCMC. No doubt MCMC only fixed the ceiling price, but ultimately the entire contractual document must be registered in order to be legally valid and binding (s 150 of the Act). Thus, whatever that has been agreed upon per the agreements, including pricing etc, are deemed to have been implicitly approved by MCMC.

[45] The injunction (per encl 7) was to restrain the defendant from implementing the suspension notice dated 19 October 2023. But it is significant to note that the suspension was approved by MCMC (per their letter dated 17 October 2023 to the defendant).

[46] Counsel for the plaintiff sought to repudiate the suggestion that MCMC was relevant and necessary party. It was argued for the plaintiff that this was a contractual dispute between the plaintiff and the defendant and that the MCMC are not a relevant and necessary party. According to the plaintiff, the MCMC (via its personnel) may at best come as witnesses in the suit.

[47] It is trite that an injunction may be refused if a relevant and necessary party is not before the court. The case in point is *Hong Kong Vegetable Oil Company Ltd A v Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13 where Justice AP Rajah (at pp 15–16 of the judgment) laid down the principle in the following words:

> Therefore, in the instant case I was of the view that I had first to decide whether there is in fact and in law a serious question to be tried and again in my view *implicit in 'a serious question to be tried' is the question whether the action is properly conceived and whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented.* In my judgment, *if these elements or any of them are not present then, because of non-compliance with this principle alone, the motion should stand dismissed*. I therefore proceeded to consider the allied questions of *whether the Singapore Suit is properly conceived and/or all the proper, necessary and/or interested parties are before the court*.

[48] At p 16 the judge said:

> In my judgment, *the London company should have been the plaintiffs in the Singapore Suit or at the very least it should have been co-plaintiffs with the Hong Kong company, the plaintiffs in the Singapore Suit*. And if the London company had been unwilling to be joined as plaintiffs then they should have been made defendants. Having come to this conclusion I was of the opinion that the *Singapore Suit was misconceived and that therefore the plaintiffs did not comply with principle (1)* as enunciated by Sir John Pennycuick.

[49] Finally, at p 17 the judge concluded:

> Due to these defects in the action. I was not satisfied that there was a serious question to be tried. To my mind *'a serious question' can only arise if the proper, necessary and/or interested parties, in the first instance, are before the Court.*

[50] The decision of the House of Lords in *London Passenger Transport Board v Moscrop* [1942] AC 332 (HL) is also relevant and instructive in this regard. It was a case concerning declaratory relief. The principle that was enunciated therein is equally applicable to an application for equitable reliefs. At p 345 Viscount Maugham enunciated that save in very exceptional circumstances, declaratory relief will be refused if the relevant, necessary and affected parties are not before the court. He said:

> I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the *courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made*.
>
> In the Chancery Division, in which this case started, the rule would seem to be almost invariable, and the well-established practice in actions by shareholders and debenture holders may be mentioned as instances of the rule. With the greatest respect for the Court of Appeal, I think that the amended declaration pronounced by that court, even if the section were applicable, ought not to have been made. (Emphasis added.)

[51] In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551; [1995] 3 AMR 305 (CA) Justice Gopal Sri Ram speaking for the Court of Appeal referred to the above-mentioned passage from the *Moscrop* case and said relevantly at p 424 (MLJ), 'These words though spoken in the context of declaratory relief *are of general application*'.

[52] Thus, it is clear that the principle that was enunciated in the *Moscrop* case is equally applicable to a case such as the present one where the plaintiff is seeking equitable reliefs against the defendant in circumstances where the injunctive reliefs sought will affect MCMC's regulatory role, function and powers.

[53] As stated earlier, MCMC had already rejected the plaintiff's allegations against the defendant as 'unsubstantiated' and had gone ahead and given their approval to the defendant to 'suspend' the DTTS. The plaintiff's complaints against the defendant which were escalated by the plaintiff to MCMC are the very subject matter of the suit and now the appeal before the Appeal Tribunal. Thus, any which way that one looks at the situation, MCMC's involvement in the factual matrix is quite inescapable.

[54] It is obvious enough that the injunction, if granted, on terms as prayed for in encl 7, will result in MCMC's decision (per their letter dated 12 October 2023) and the approval for suspension (per their letter dated 17 October 2023) being cast aside or put in suspended animation. The injunction will effectively be a suspension or dilution of MCMC's function as regulator under the Act. On that analysis, MCMC is in our view, an affected party and they should be given an opportunity of being heard in respect of the suit and in particular, encl 7. We do not for a moment think that such an injunction can or should be granted without the presence of MCMC, a statutory regulator, whose decision is directly under curial scrutiny in the suit. They should therefore be heard.

[55] Counsel for the plaintiff said that MCMC can be added at this stage. Counsel for the defendant said that the plaintiff cannot just make an oral application and that a formal application should be made to add MCMC as a party. We agree. Indeed, it should have been obvious from the beginning that MCMC was a relevant and necessary party and they should have been added as a party when the suit was filed. Of course, we foresee all kinds of objections that MCMC might have taken if they were named as a party but that is the nature of the invidious situation that the plaintiff finds itself in.

[56] The answer to this conundrum lies in ss 120 and 121 of the Act and the Conditions in the access agreement, the combined effect of which is that the party which is not in breach, must pursue the remedies as per the Act, but (per Condition 8.8 of the access agreement) with the absolute right to apply to court for interlocutory reliefs. When the domestic remedy is exhausted the affected party may then pursue court proceedings but only via judicial review (s 121 of the Act).

[57] For completeness, we should add that MCMC as the regulator has the obligation to ensure that there is no anti-competitive conduct by a licensee. Here, the plaintiff's complaint is exactly that — the defendant is in a dominant position and is engaged in anti-competitive conduct. In this regard, s 133 of the Act reads as follows: 'A licensee shall not engage in any conduct which has the purpose of substantially lessening competition in a communications market'.

[58] It is also relevant to note that s 139 of the Act empowers the MCMC to

direct a licensee who is in a dominant position to cease the anti-competitive conduct. The section reads as follows:

> (1) The Commission may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market, and to implement appropriate remedies.
>
> (2) The Commission may only issue a direction under subsection (1) if the Commission is satisfied that the direction is consistent with —
>
> (a) the objects of this Act; and
>
> (b) any relevant instrument under this Act.

[59] We have examined the underlying facts, the events, the correspondence between the plaintiff and defendant and MCMC, the applicable provisions under the Act and the relevant conditions of the access agreement which have all been clearly and lucidly narrated in the statement of claim and in the JC's grounds of judgment. In our opinion, the JC cannot be criticised for reaching that conclusion on the material that was before him. There is consequently no reason that we can see for saying that the JC decision was clearly wrong on the materials before him.

[60] We agree that the plaintiff ought to have pursued the domestic statutory remedy of appealing to the Appeal Tribunal (*which they only did recently on 6 March 2024*) and awaited the outcome of the appeal before filing legal action (*which is limited only to judicial review*).

[61] Thus, there seems to be no scope for the plaintiff to file a civil action without pursuing the statutory remedy under the Act. The scheme of the Act is that the affected party must pursue the remedies as provided for under the Act. We note of course that the Act itself does not provide for any stay of suspension of DTTS pending an appeal to the Appeal Tribunal. That difficulty is overcome by the fact that under the agreements parties can seek interim interlocutory relief from the court.

[62] Whilst we are persuaded that there are some important issues (ordinarily qualifying as issues to be tried) arising out of the plaintiff's complaints against the defendant and indeed indirectly against MCMC as well, it is clear that the plaintiff should have pursued interlocutory reliefs by way of an originating summons whilst at the same time pursuing the appeal process under the Act.

[63] Consequently, we are in total agreement with the JC that the MCMC is a relevant and necessary party to the action that was filed. We agree that the plaintiff's case against the defendant is inextricably linked to its case against MCMC as the regulator.

[64] Of course, it is tempting to say that since an appeal has been lodged, we should regard the suit as the appropriate legal platform for granting interlocutory relief. In our view, that would be too much of a procedural leap. Furthermore, the issue of MCMC's absence as a party to the suit is still an insurmountable legal hurdle.

[65] For the reasons stated above, we agree with the decision of the JC. The appeal is dismissed. The decision of the High Court is affirmed. We allow costs of RM50,000 (subject to allocatur). The costs herein are payable forthwith.

Appeal dismissed.

Reported by Ahmad Ismail